

2012 JUL 27 PM 1:33

No. 42925-0-II  
Cons. into **41201-2-II**

STATE OF WASHINGTON

BY \_\_\_\_\_

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA  
L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND  
LETA L. ANDERSON FAMILY TRUST; AND RIVER PROPERTY  
LLC,

Respondents/Cross-Appellants,

v.

JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD;  
TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI  
D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG,  
husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband  
and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife;  
LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E.  
MCCLASKEY, JR. and VERONICA A. MCCLASKEY, TRUSTEES OF  
THE MCCLASKEY FAMILY TRUST—FUND A; CRAIG STEIN,  
RICHARD AND CAROL TERRELL, husband and wife,

Appellants/Cross-Respondents.

---

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

---

HEURLIN, POTTER, JAHN, LEATHAM & HOLTSMANN, P.S.  
Stephen G. Leatham, WSBA #15572  
211 E. McLoughlin Blvd, Suite 100  
PO Box 611  
Vancouver, WA 98666-0611  
(360) 750-7547  
sgl@hpl-law.com  
Attorneys for Appellants/Cross-Respondents

## **TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	REPLY RE STANDARD OF REVIEW .....	1
III.	REPLY TO COUNTER-STATEMENT OF THE CASE .....	2
IV.	ARGUMENT .....	4
	A.    As a Matter of Statutory Interpretation, the Hearing Examiner Erred in Concluding that the Proposed Subdivision did not Constitute an Alteration.....	4
	B.    The Hearing Examiner’s Error Was Far From Harmless .....	6
V.	CONCLUSION.....	7

## **TABLE OF AUTHORITIES**

### **Cases Cited**

<i>Isla Verde International Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740 (2002) .....	2
---	---

### **Rules and Statutory Provisions**

RCW 58.17 .....	3, 6
RCW 58.17.010 .....	3
RCW 58.17.020 .....	4
RCW 58.17.030 .....	2
RCW 58.17.060 .....	4, 5
RCW 58.17.215 .....	2, 4, 5, 6
RCW 58.17.215-220 .....	1
VMC 20.320.080(D) .....	1, 2

## **I. INTRODUCTION**

The question before this Court is whether the City of Vancouver Hearing Examiner erred in concluding that Respondents' proposed subdivision of their lot did not constitute an "alteration" under RCW 58.17.215-220 and under Vancouver Municipal Code 20.320.080(D). The parties agree that this is a question of first impression in the State of Washington. The City of Vancouver agrees that its own hearing examiner's decision should be reversed because the effect of the proposed subdivision would be to change the application of note 4 on the Rivershore plat. *See* Opening Brief of City of Vancouver.

The City's position is extremely significant. Respondents argue that a reversal would undermine the planning goals of the Growth Management Act and local zoning provisions. *See* Respondents' Opening Brief, at 17-18. The fact that the City believes its hearing examiner's decision should be reversed establishes that this argument is baseless.

## **II. REPLY RE STANDARD OF REVIEW**

Respondents erroneously argue that this Court should give "substantial deference" to the decision made by the hearing examiner. *Id.* at 2. The question before the Court, however, does not involve an area in which the hearing examiner has expertise; accordingly, deference is not warranted. The proper standard was set forth in *Isla Verde International*

*Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 (2002): “Statutory construction is a question of law reviewed de novo under the error of law standard.”

### **III. REPLY TO COUNTER-STATEMENT OF THE CASE**

Respondents appear to argue that only alterations involving public dedications must be processed pursuant to RCW 58.17.215. Respondents’ Opening Brief, at 4. There is no such limitation in the statute. Indeed, RCW 58.17.030 provides that short subdivisions shall “comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060.” The City of Vancouver adopted such a local regulation at Vancouver Municipal Code 20.320.080(D). In that local regulation, the City provided:

Any alteration or modification of a short subdivision or subdivision plat shall be undertaken pursuant to all applicable development standards including regulations established in 58.17.215-220 RCW...

Thus, neither of the statutes nor the City regulation limits the applicability of alteration procedures to alterations involving public dedications.

Respondents accurately note that the Vancouver City Attorney’s office has issued two letter opinions regarding respondents’ short plat application. Respondents’ Opening Brief, at 6-8. What is most significant, however, is the position the City has taken in connection with

this appeal. The City strongly agrees with appellants that the short plat application must be processed as an alteration. *See* Opening Brief of City of Vancouver. The City believes that the proposed plat is inconsistent with the plat map and the Rivershore CC&R's. It is this position to which this Court should give deference.

Because the City believes that respondents' application must be processed as an alteration, the proposed subdivision would not serve one of the purposes of RCW Ch. 58.17, which is to enable the "approval of proposed subdivisions which conform to zoning standards and local plans and policies..." RCW 58.17.010 (emphasis added.) Unless the proposed application is processed as an alteration, it does not conform to the plans and policies of the City of Vancouver.

Respondents also erroneously contend that the hearing examiner "expressly found" that the proposed subdivision would not alter an undivided one-thirteenth interest in Tract A. Respondents' Opening Brief, at 10. The hearing examiner made no such finding. *See* Findings 1 and 13, at CP 398 and 400. Instead, the hearing examiner merely concluded that respondents did not "seek" to divide that one-thirteenth interest. CP 407. Respondents' stated intent does not mean that the effect of the proposed subdivision would not be to alter or dilute the ownership of Tract A. The City of Vancouver has correctly concluded that the proposed

subdivision would indeed alter or dilute Tract A ownership, contrary to the plat and the CC&R's.

#### **IV. ARGUMENT**

##### **A. As a Matter of Statutory Interpretation, the Hearing Examiner Erred in Concluding that the Proposed Subdivision did not Constitute an Alteration.**

The question before the Court concerns the legislative intent behind its enactment of RCW 58.17.215. The determination of the legislative intent is not a matter whereby this Court should give deference to the hearing examiner, contrary to the arguments raised by respondents. Respondents' Opening Brief, at 2-3. If anything, this Court should give deference to the position of the City of Vancouver and agree with its position that this proposed subdivision constitutes an alteration under the Vancouver Municipal Code and state statutes.

The Legislature provided no guidance as to what constitutes an "alteration." The term is not defined in RCW 58.17.020. Appellants again suggest, as they did in their opening brief, that the Court should look to the dictionary meaning of the word. In Webster's Third New International Dictionary, "alter" is defined as: "To cause to become different in some particular characteristic."

The Court should also consider the effect of RCW 58.17.060. That statute provides that alterations involving a public dedication must be

processed under the plat alteration statutes. Here, the proposed subdivision may well result in the actual or practical conveyance of an interest in Tract A, and therefore the present proposed subdivision alone may well “involve” a public dedication.

Moreover, the language of RCW 58.17.060 is specifically directed to public dedication alterations. Accordingly, RCW 58.17.215, the more general statute, should be interpreted to apply to alterations that do not involve public dedications. By its terms, the statute is broad and all-encompassing: “When any person is interested in the alteration of **any subdivision** or the altering of **any portion thereof**,...that person shall submit an application to request the alteration...” RCW 58.17.215 (emphasis added).

Changing an almost 50,000 square foot lot into two lots, in an extremely upscale riverfront neighborhood, is without question an alteration of that lot. Respondents must therefore follow the requirements of the statute.

The City of Vancouver properly discusses the reasons why the proposed subdivision would change the application of note 4 on the Rivershore plat. Appellants agree with the City’s position in this regard, and submit that the City’s reasoning provides an entirely appropriate basis for the hearing examiner’s decision to be reversed.

The present question involves an uncertain area of the law. It is not an area of the law in which the City hearing examiner has experience or expertise. This Court should reverse the hearing examiner and find, on de novo review, that the proposed subdivision constitutes an alteration under RCW Ch. 58.17.

**B. The Hearing Examiner's Error Was Far From Harmless.**

Respondents suggest that, even if the hearing examiner erred, the error was harmless. Respondents suggest that only respondents themselves would have to sign the alteration application if the alteration procedures of RCW 58.17.215 were required to be followed.

This Court should reject that nonsensical argument. If only the owners of a lot to be altered (*i.e.*, the applicants themselves) are required to sign an alteration application, the statutory requirement of obtaining signatures would be rendered meaningless. The intent of RCW 58.17.215 is to allow other owners in a subdivision to have a voice when someone proposes an alteration of their subdivision.

The hearing examiner should be reversed, and respondents should be required to obtain the requisite signatures from the other lot owners in Rivershore.

## **VI. CONCLUSION**

For the foregoing reasons, and as set forth in appellants' opening brief and in the City of Vancouver's opening brief, this Court should reverse the Hearing Examiner and remand this case to Clark County Superior Court with instructions that respondents must submit a plat alteration application in order to subdivide their lot.

DATED this 25 day of July, 2012.

HEURLIN, POTTER, JAHN,  
LEATHAM & HOLTSMANN, P.S.

A handwritten signature in black ink, appearing to be 'S. Leatham', written over a horizontal line.

Stephen G. Leatham, WSBA #15572  
Of Attorneys for Appellants/Cross-  
Respondents

**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS to be served on the following:

Steven B. Tubbs  
Attorney at Law  
7001 SE Evergreen Hwy.  
Vancouver, WA 98664

Brent Boger  
Assistant City Attorney  
PO Box 1995  
Vancouver, WA 98668

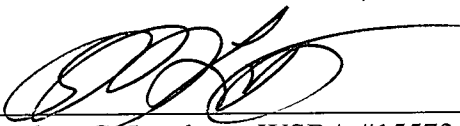
Alexander W. Mackie  
Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101

Cary Cadonau  
Brownstein Rask Sweeney Kerr Grim  
DeSylvia & Hay LLP  
1200 SW Main Street  
Portland, OR 97205

FILED  
COURT OF APPEALS  
DIVISION II  
2012 JUL 27 PM 1:33  
STATE OF WASHINGTON  
BY DEPUTY

by mailing, by U.S. Mail, First Class postage prepaid, a true copy to the foregoing on the 25 day of July, 2012.

HEURLIN, POTTER, JAHN,  
LEATHAM & HOLTMANN, P.S.

  
\_\_\_\_\_  
Stephen G. Leatham, WSBA #15572  
Of Attorneys for Appellants/Cross-  
Respondents